

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,281

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare finding that she is ineligible for Medicaid benefits based on a failure to prove disability.

FINDINGS OF FACT

1. The petitioner is a thirty-seven-year-old woman with a high school diploma and two or three terms at a junior college studying computer sciences which studying stopped in 1992 due to medical problems. She has a work history as a waitress and maid both of which required her to stand and walk for eight hours per day and lift objects of from light (10 pounds) to moderate weight (50 pounds).
2. The petitioner last worked as a waitress in September of 1994 but quit because she was facing nasal surgery and because she was unable to do some heavier work like lifting and mopping floors required by her employer. She has had a chronic problem with sinus infections for which she has had two operations, one in May of 1993 and one in October of 1994. She continues to have intermittent discharge from her nose and occasional facial pain (once per week) due to the residuals of this problem. She also has occasional headaches or migraines and neck pain possibly as a result of a fall on her head in 1986. In addition, she also has asthma, which is generally well controlled but which flares up at intermittent intervals and has caused her as recently as May of this year to need inhalation therapy in a hospital emergency room, and mild obstructive airway disease. Finally, the petitioner has chronic depression and anxiety for which she has received pharmacological treatment and counseling therapy in the recent past.
3. The petitioner has seen many doctors and specialists, had many tests, and has received an extensive array of drugs, surgeries and other kinds of treatments for her various medical problems. She has primarily been treated by a family physician, Dr. Shapiro, whom she has been seeing regularly and extensively (at least twenty visits) for almost two years. In a report written in May of 1995, Dr. Shapiro

finds that the petitioner is limited based on her physical condition to standing and walking for no more than four hours per day but that she can sit for eight hours per day (six hours at a stretch). He has limited her ability to lift to ten pounds on a repeated frequent basis and fifty pounds on an occasional basis. Her ability to carry is also ten pounds on a repeated basis but only twenty-five on a repeated basis. She is unable to crawl, and bending, squatting and climbing can only be performed occasionally. She can only withstand moderate exposure to temperature and humidity extremes and dust, fumes and gases.

4. Most recently, the petitioner, on the referral of Dr. Shapiro, has seen several experts in pulmonary disease, asthma and neurology for a more in depth exploration of her problems. The conclusion reached by the pulmonary expert was that the petitioner has a mild degree of obstructive airway disease with evidence of bronchodilator responsiveness. He prescribed treatment for her with medication inhalers and tried to start her on a serious smoking cessation program. He felt that much of the medication would be unnecessary if she could cease her heavy (2-3 packs per day) smoking habit. He noted no particular restrictions based upon this problem.

The petitioner's asthma had been accompanied by chronic asthmatic bronchitis which occurs with some severity about six times per year necessitating some intervention, usually in the emergency room for inhalation therapy. The petitioner could best avoid this problem by cessation of smoking and avoidance of exposure to airborne irritants or extremes in weather. Although no specific activities were excluded by the physician, he stated that her level of endurance would vary with the state of the disease and concluded that the extent of the petitioner's "disability will largely depend on her compliance with medical regime and success at stopping smoking, however her evaluation and treatment continues under the guidance of her regular physician, Dr. Shapiro".

The neurologist treated the petitioner for chronic neck pain and prescribed medications and physical therapy based on his finding of tender occipital nerves and paracervical musculature although his examination of her spine and upper extremities was normal. He also recommended her for possible occipital nerve decompression. The petitioner's treating physician, Dr. Shapiro, was aware of all these reports when he made his assessment in May of 1995.

5. The petitioner has a long history of treatment for low level depression. A consultative exam performed in November of 1994, identified her problem as dysthymia and stated that it was connected with the resolution of her health problems. That consultant felt that the petitioner's numerous health complaints would likely interfere with her regular attendance at work. Following numerous complaints to Dr. Shapiro that she was "stressed out" because of an ongoing divorce from an alcoholic husband, the petitioner was placed on drugs and referred for mental health counseling. It is not clear that she complied with drug treatment as she had numerous complaints about drug therapy, particularly that she had been taking too many drugs for all these problems and felt "drugged out". However, she did start attending counseling sessions in December of 1994. Those sessions revealed that the petitioner has had some suicidal tendencies in the past and abuses alcohol from time to time and noted that she was poorly motivated to deal with her depression due to her physical problems. She had many cancellations and failures to show during her treatment. In March of 1995, following a car accident which occurred while the petitioner was intoxicated, she was determined to be severely depressed and was hospitalized for her safety. She seems to have recovered from this episode and has not had any further psychotherapy although records in late May of 1995 regarding her hospitalization for asthma note that she appeared to be in a severe phase of a major depressive disorder.

6. A detailed mental health assessment was provided by Dr. Shapiro in April of 1995, based upon his

knowledge of her. It is not clear that he had seen notes from her mental health counselors when he made this assessment and it was made before her hospitalization for asthma. He diagnosed her as suffering from a stress disorder with a depressive reaction and an anxiety disorder. Her "depressive syndrome" was accompanied by anhedonia, appetite disturbance with weight loss of about fifteen pounds in the last year, sleep disturbance, decreased energy, feelings of worthlessness, problems with concentrating and easy distractibility. He felt she was moderately limited in her ability to maintain a work schedule and attendance and also moderately limited with regard to her ability to complete a normal workday. He had no information about her social functioning or possibilities about deterioration or decompensation at the work place. Her "anxiety disorder" is characterized by motor tension, autonomic hyperactivity, apprehensive expectation, vigilance and scanning. He described her as having a personality disorder which is characterized by a persistent disturbance of mood, intense and unstable interpersonal relationships and impulsive and damaging behavior. The result of these two disorders is a moderate restriction in the activities of daily living and slight difficulties in concentration.

7. The petitioner does not agree with Dr. Shapiro with regard to the length of sitting, standing and walking time he felt she could do. She feels she is much more limited due to "back and hip" problems and her "neck injury". While she generally cares for herself, she has a friend with whom she is living do the heavier chores such as vacuuming and taking out the garbage. She spends her days napping, reading and listening to the radio and dealing with pain in some part of her body. She says she "gets a new disease every other month." She has been homeless since her divorce proceeding began and lives with friends. She used to enjoy swimming, dancing, walking in the woods, horseback riding and working on the computer but can no longer do those things. She says that working with a computer causes her eyes to strain, and her head and neck to start to ache. She also says that she has tried to give up smoking but that she has been heavily addicted for over twenty years, since she was a teenager, and has a great deal of difficulty quitting now, especially since she is under a great deal of stress.

8. All of the above medical records are essentially consistent and are adopted as accurate herein. Specific findings and conclusions of Dr. Shapiro as set forth in paragraphs three and six above are adopted as findings herein based upon his superior knowledge of the petitioner and all her medical records (with the possible exception of her mental health counseling records). To the extent Dr. Shapiro is unable to make findings with regard to the petitioner's social functioning and ability to attend work regularly, it is found based on comments made by the petitioner and her other treating sources, especially based on her mental health records, that the petitioner has difficulty in interpersonal relationships, is currently homeless, has suicidal tendencies, suffers from alcoholism which results in destructive behavior and may have problems attending work regularly because of her many health problems. To the extent that the petitioner's statements are not in accord with those of her treating sources, they have not been afforded much weight.

ORDER

The Department's decision is reversed.

REASONS

The petitioner appeals the decision by the Department of Social Welfare denying her application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

The medical findings indicate that the petitioner is restricted by her physical medical condition to

performing light work which is defined in the regulations as:

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for a long period of time.

20 C.F.R. 416.967(b)

If the petitioner had no other impairments, the Medical Vocational Guidelines would direct a finding of not disabled based upon her classification as a younger (18-49) individual and her relatively high level of educational achievement. See 20 C.F.R. 404 Subpart P, Appendix 2, Rule 202.20. However, the petitioner has significant mental impairments which additionally impact on her ability to perform job duties.

The petitioner has been diagnosed as experiencing both depression and anxiety. The listings of impairments at 20 C.F.R., 404 Subpart P, Appendix I for mental disorders describe the level of severity needed for an automatic finding of disability for either of these two problems which require meeting first an "A" section describing the manifestations which in pertinent part, are as follows:

12.04 Affective Disorders:

Characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation; or
- e. Decreased energy; or
- f. Feelings of guilt or worthlessness; or

- g. Difficulty concentrating or thinking; or
- h. Thoughts of suicide; or
- i. Hallucinations, delusions or paranoid thinking; or
- ...

12.06 Anxiety Related Disorders:

In these disorders anxiety is either the predominant disturbance or it is experienced if the individual attempts to master symptoms; for example, confronting the dreaded object or situation in a phobic disorder or resisting the obsessions or compulsions in obsessive compulsive disorders.

The required level of severity for these cases is met when the requirements in both A and B are satisfied, or when the requirements in both A and C are satisfied.

A. Medically documented findings of at least one of the following:

- 1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms:
 - a. Motor tension; or
 - b. Autonomic hyperactivity; or
 - c. Apprehensive expectation; or
 - d. Vigilance and scanning;
 - ...

Both sections use the same "B" test:

B. Resulting in at least two of the following:

- 1. Marked restriction of activities of daily living; or
- 2. Marked restriction in maintaining social functioning; or
- 3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
- 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

The listings for "anxiety related disorders" adopts an alternative "C" test which requires that the characteristics above result "in complete inability to function independently outside the area of one's home." 20 C.F.R. 404, Subpart P, Appendix I, Rule 12.06.

The petitioner's physician has confirmed that she meets paragraph A (1)(a),(b),(c),(e),(f) and (g) under affective disorders and paragraph A(1)(a),(b),(c) and (d) under anxiety related disorders. However, he was able to confirm only moderate restrictions in activities of daily living, slight deficiencies in concentration, persistence or pace and could not provide any information on her ability to maintain social functioning or on episodes of deterioration. The moderate assessment for daily living restrictions falls just short of the "marked" restriction required and the "slight" deficiency in concentration is two levels of severity removed from the listings level.

What can be concluded from the above is that the petitioner comes close to meeting the two listings of impairments but does not reach either. However, she can still meet the disability standards if she can show that she has a combination of impairments which are equal to the severity level above even though no individual impairment is itself sufficiently severe. 20 C.F.R. § 416.923. Such a showing is not an exact science and there is nothing in the regulations that suggests how one kind of restriction is compared with or added up to meet another. However, the petitioner in this case has such a wide range of documented physical and mental problems that it would be difficult to conclude that she has any greater capacity to work than a person who has none of her physical problems but a mental disorder which results in slightly more difficulty accomplishing daily living tasks and somewhat more difficulty in concentrating. It is also not hard to conclude from the evidence that the petitioner, who is homeless, intermittently suicidal, quite possibly alcoholic and unemployed, does have some current difficulties with social functioning and would have problems showing up regularly and persisting in a work environment, which further supports the combined severity of her situation. As the petitioner's condition at least equals the listings in terms of severity, she should be found eligible for benefits. 20 C.F.R. 416.920(d).

The petitioner should be aware that the Medicaid regulations do require her to follow prescribed medical treatment unless she has good cause not to do so in order to receive continuing benefits. 20 C.F.R. 416.930. This means she would be required as a condition to retaining benefits to take medications and to actively attempt to curb her nicotine and alcohol addictions and to follow other medical treatment prescribed for her or risk losing her benefits. She is encouraged to seek and follow treatment as it appears that many of her health problems may be, to some extent, within her control.

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